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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 437

JAMES PECK, MARCUS COHEN, RALPH DI GIA, *et al.*,
Appellants,
v.
NEW YORK.

ABRAHAM J. MUSTE, PATRICIA RUSK, KENT LARRABEE, *et al.*,
Appellants,
v.
NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellants, in each of these cases, appeal from the final order and judgment of the Court of Appeals of the State of New York entered on December 30, 1959, affirming (4-3) the order and judgment of the Appellate Part of the Court of Special Sessions of the City of New York, First Judicial Department entered on May 29, 1958, which affirmed the judgment of the Magistrate's Court of the City of New York convicting appellants of the offense of wilfully and unlawfully violating the provisions of Section

101, Subdivision 2-b of the New York State Defense Emergency Act.

Appellants file this statement to show that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgments in these cases and should exercise such jurisdiction because substantial questions are presented.

Opinions Below

These cases were argued and decided together in the Court of Appeals of the State of New York and, also, in the Appellate Part of the Court of Special Sessions of the City of New York, First Judicial Department. Each case was tried separately and at a different time in the Magistrate's Court of the City of New York. Each of these cases involves identical questions.

The *per curiam* opinion of the Court of Appeals of the State of New York, three judges dissenting, and the dissenting opinion were filed December 30, 1959, and are reported officially in 7 N. Y. 2d 76, and unofficially in 195 N. Y. S. 2d 637 and 163 N. E. 2d 866. (A copy thereof is annexed hereto as Exhibit "A" in Appendix "A".)

The Court of Special Sessions of the City of New York, Appellate Part, First Judicial Department, wrote no opinion.

In *Peck*, no opinion was rendered by the Magistrate's Court of the City of New York, Arrest Part, District of Upper Manhattan, Borough of Manhattan, which entered on January 17, 1957, under the name of "The People, etc. v. James Peck and 18 Others", the judgment of conviction of the 11 appellants herein.

In *Muste*, two opinions were rendered by the Magistrate's Court of the City of New York, Arrest Part, Dis-

trict of Lower Manhattan, Borough of Manhattan, which entered on December 22, 1955, under the name of "The People, etc. *v.* Rocco Parilli and 28 Others", the judgment of conviction of the 18 appellants herein. These opinions are reported officially in 1 Misc. 2d 201 and 1 Misc. 2d 499, and unofficially, together, in 147 N. Y. S. 2d 618. (Copies of these opinions are attached hereto as Exhibits "B" and "C", respectively, in Appendix "A".

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

(a) Nature of the Proceedings

Two criminal proceedings are involved on this appeal.

(1) In *Peck*, the defendants, 19 in number, were charged (R. pp. 18-19)* with the offense of violating Section 101 (2-b) of the New York State Defense Emergency Act, in that on July 20, 1956 between 4:10 and 4:25 P.M. in Washington Square Park in the City, County and State of New York, "acting in concert with each other" they "did wilfully and unlawfully fail to obey the order of the deponent (i.e., Hearn), who is duly authorized to make such order concerning the conduct of civilians and the movement and cessation of pedestrian and vehicular traffic, under the following circumstances: At the abovementioned time and place, during a duly authorized air raid drill, the defendants did refuse to take shelter in the nearest designated air raid shelter to that place when ordered to do so by the deponent; but did remain in the open in said park."

Section 101 (2-b) of the New York Defense Emergency Act, so far as relevant, provides:

* Figures in parenthesis, unless otherwise noted, are as follows: "R" refers to pages and "fol." refers to folios in the *Peck* printed record; "S. M." and "id." refer to pages in the Stenographic Minutes of the original *Muste* record, not printed.

"2. Any person who shall violate or disobey any duly promulgated regulation or order, or who shall wilfully violate or disobey any official order by a person duly authorized, concerning * * * (b) the conduct of civilians and the movement and cessation of pedestrian and vehicular traffic shall be guilty of a misdemeanor."

Defendants were arraigned in Night Court and each was put under $100 bail. Throughout the proceedings, defendants objected, unsuccessfully, to the jurisdiction of the Magistrate's Court to hear and determine the case, on the ground that, under the New York Constitution, statutes and decisions, only Courts of Special Sessions, and not Magistrate's Courts, had jurisdiction in New York City of offenses of the grade of misdemeanor. Defendants did not waive their asserted constitutional right to be tried in and by the Court of Special Sessions of the City of New York and did not consent to a trial before a Magistrate.

The case as to eight defendants was otherwise disposed of. The eleven defendants remaining, the appellants here, were tried in the Magistrate's Court of the City of New York, Arrest Part, District of Upper Manhattan, Borough of Manhattan, on January 16, 1957. Appellants' renewed challenge to the jurisdiction of the Magistrate's Court was overruled (R. pp. 99-101). After trial, each appellant was found guilty of a misdemeanor as charged and sentenced to pay a fine of $25 or to 5 days in prison (R. pp. 274-5, 17).

On January 18, 1957, appellants appealed to the Appellate Part of the Court of Special Sessions (R. p. 9-13), which affirmed the judgment of conviction, without opinion, on May 29, 1958 (R. pp. 7-8). By permission of the Court of Appeals, appellants appealed to that Court on

June 26, 1958 (R. p. 6). The Court of Appeals affirmed (4-3) on December 30, 1959.

(2) In *Muste,* (See Original Record) the defendants, 29 in number, were charged with wilfully and unlawfully violating the provisions of said Section 101 (2-b) of the New York State Defense Emergency Act on June 15, 1955 at about 2:05 P.M. at City Hall Park, City, County and State of New York, in that during the air-raid alarm they, "acting together", failed to obey an official order by a duly authorized person concerning the conduct of civilians; as appears from the following: "That during an air-raid alarm, and before the all clear signal, all of these defendants were seated near each other on park benches at City Hall Park, that some of said defendants carried placards containing messages concerning war and H bombs. That deponent (i.e., Hearn) approached the defendants, informed them that by authority of his position as an auxiliary police officer he was ordering them to take shelter, whereupon the defendants refused to do so, and were placed under arrest."

Defendants were thereupon arraigned in Night Court. Each defendant was put under $1,500 bail and remanded to the Tombs prison, where they remained overnight until bail could be posted.

Throughout the proceedings, defendants questioned on the same ground noted above, the jurisdiction of the Magistrate's Court and did not waive their asserted constitutional rights to a trial in and by the Court of Special Sessions and did not consent to a trial by a Magistrate.

On September 28, 1955, the Magistrate rendered a preliminary decision sustaining jurisdiction of the Magistrate's Court (*People* v. *Parilli,* 1 Misc. 2d 499). Thereafter, the case as to 11 defendants was otherwise disposed of. On November 16, 1955, the case as to the remaining 19 defendants, the appellants here, was tried

before the same Magistrate. On December 22, 1955, the Magistrate rendered his decision and judgment of guilty of a misdemeanor as charged, suspending sentences (*People* v. *Parilli*, 1 Misc. 2d 201; S.M., of December 22, 1955).

On January 20, 1956, appellants appealed to the Appellate Part of the Court of Special Sessions. Argument of this appeal was held up pending the proceedings in *Peck*. Eventually, both appeals were heard together and that Court affirmed the judgments of conviction, without opinion, on May 29, 1958. By permission of the Court of Appeals, appellants appealed to that Court on June 26, 1958. The Court of Appeals affirmed (4-3) on December 30, 1959.

(b) Dates of Judgments and of Appeals

The orders and judgments of the New York Court of Appeals, sought to be reviewed, were made and entered on December 30, 1959. Copies thereof are attached hereto as Exhibits "D" and "E" in Appendix A. Notices of appeal therefrom were filed on March 28, 1960 in the Appellate Part of the Court of Special Sessions of the City of New York, First Judicial Department, the Court possessed of the record of each of these cases. The time for filing the appeals in these cases in the United States Supreme Court was extended to and including September 24, 1960 by orders of Mr. Justice Harlan dated May 26, 1960 and August 24, 1960.

(c) Statutory Provisions Conferring Jurisdiction

The jurisdiction of the United States Supreme Court to review by direct appeal the orders and judgments herein of the New York Court of Appeals is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c), which provide that a final judgment rendered by the

highest court of a state in which a decision could be had may be reviewed by the Supreme Court by appeal, where, as here, is drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution or laws of the United States, and the decision is in favor of its validity.

(d) Cases Sustaining Jurisdiction

The following decisions, among others, are believed to sustain the jurisdiction of the United States Supreme Court to review the orders and judgments herein on direct appeal: *DeVeau* v. *Braisted*, 363 U. S. 144, 146 (1960), 361 U. S. 806 (1959); *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684 (1959); *Smith* v. *California*, 361 U. S. 147 (1959); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Zorach* v. *Clauson*, 343 U. S. 306 (1952).

(e) State Statute the Validity of Which is Involved

Involved on this appeal is the validity of New York State Defense Emergency Act (Laws of 1951, Ch. 784, as amended; Book 66 A, McKinney's Consolidated Laws of New York (1960 Edition), Sections 1-122, inclusive, at pages 21-77). A copy of the complete, official, annotated edition of that Act will be submitted to this Court with this Statement as to Jurisdiction. Sections of that Act directly and immediately involved herein are Sections 101, subd. (2-b) and (6); 102; 100, subd. (1) and (2); and 2 (last paragraph). The pertinent texts of these Sections are set forth in Appendix "B".

Also involved, incidentally, is the validity of the regulations or directives of the New York Civil Defense Commission and the Civil Defense Bureau of the Police Department of the City of New York promulgated on the

authority of said statute; and the orders thereunder of complainant Hearn as Deputy Chief of the Auxiliary Police of the City of New York. Said regulations or directives are lengthy. They constitute part of the records of these cases being filed herewith: In *Peck*, they constitute People's Exhibits "1", "2" and "3", and relevant excerpts therefrom are printed (R. pp. 276-317). In *Muste*, they constitute People's Exhibits "1", "2", "3" and "4". The claimed violated orders of complainant Hearn were oral, not written, and were the subject of his testimony on the two trials. In essence, they consisted of "asking" defendants to take shelter (Peck, R. pp. 106-115; Muste, S.M. of Nov. 16, 1955, pp. 24, 30).

Questions Presented by this Appeal

The questions presented by this appeal are as follows:

1. Are the New York State Defense Emergency Act and the alleged order given thereunder by complainant, inherently, in whole or in part, and as construed and applied herein against these appellants, in violation of the First and Fourteenth Amendments of the United States Constitution?

2. Do said Act and order, in themselves and as construed and applied herein against these appellants (a) abridge and prohibit their freedoms of religion and conscience and their free exercise thereof; (b) abridge their rights peaceably to assemble and to petition; (c) abridge and deny their liberties of speech and of the press, all in violation of the First and Fourteenth Amendments of the United States Constitution?

3. Do said Act and order, in themselves and as construed and applied herein against these

appellants, deny to them the equal protection of the laws and abridge their privileges and immunities in violation of the Fourteenth Amendment of the United States Constitution?

4. Is said Act, in so far as Section 2 thereof provides for, and has been construed and applied herein to permit, the infringement of the liberties of the people, including the freedom of speech, press and assembly, unconstitutional under the First and Fourteenth Amendments of the Constitution of the United States?

5. Did the New York Courts by their said judgments, err in failing to include appellants within the class of "exempt persons" provided for in Section 100, subd. 1 and Section 101, subd. 6 of the New York State Defense Emergency Act, and in the directives and orders issued thereunder, and in the acts taken thereunder, in that said failure was discriminatory as to them, and denied them equal protection of the laws and their freedoms of religion and conscience, guaranteed by the above-noted provisions of the Constitution of the United States?

6. Are said Act and order unconstitutional, under the Constitution of the United States, in that they represent an unconstitutional assumption, exercise and extension, in times of peace, of the war powers by the State and Federal Governments and by their respective executive and legislative branches; and, in that they represent, also, an unconstitutional delegation of legislative power by Congress to the State of New York and its political subdivisions including the City of New York and by the New York State Legislature to various state and local councils, agencies, officers and persons, including those in the City of New York and the complainant herein?

7. Do said Act and order, inherently and as construed and applied by the New York Courts deprive these appellants of rights retained by, and powers reserved to, the people, in violation of the Ninth and Tenth Amendments of the United States Constitution?

8. Is Section 102 of the New York State Defense Emergency Act in violation of the equal protection, privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution in providing that City Magistrate's Courts in the City of New York, shall have exclusive jurisdiction to hear and determine claimed violations such as those herein, constituting misdemeanors under said Act, or under any rule, regulation or order duly promulgated pursuant to said Act, committed within the territorial jurisdiction of such Courts; and also, in so far as said Section has been followed and construed in the proceedings below by the New York Courts to give to said City Magistrate's Courts, and the particular Magistrate's Court which rendered the judgments of conviction, the power and jurisdiction to hear and determine such misdemeanors charged against these appellants but not to hear and determine any other misdemeanors charged against other persons?

Statement of the Case

(a) The Peck Case

Hearn, complainant, Deputy Chief of Auxiliary Police of the City of New York, on July 20, 1956 at about 4:10 P.M. was at Washington Square Park in uniform. He was assigned to clear the Park and see that pedestrians took shelter during the Civil Defense air-raid drill (fols. 314-22). When the alert sounded at 4:10 P.M. Hearn went to people sitting in the park, including appellants, and

"asked them to take shelter". Appellants failed to move, continuing to sit quietly on the park benches. While the siren was still blowing and before other people had taken shelter, he placed appellants under arrest and put them into waiting patrol wagons (fols. 324-7, 336-44, 369-73, 436-9, 467-8, 500-3, 550-5, 591-2, 621-2, 654-5, 669, 680, 686-9, 692, 698, 726, 741-2, 748, 762-4, 773; Defs. Exs. I, J, K).

Hearn testified the "order" alleged to have been violated by appellants was oral, to wit: "I told them that there was a drill, a state order drill and I asked them to take shelter" (fols. 341-4).

Appellants had read in the newspapers, prior to July 29, 1956, that there was to be an air raid drill on that day—based on a hypothetical or assumed air-raid, as distinguished from any real or suspected air-raid. All publicity releases preceding the drill so stated (fols. 539, 629-35, 642-3, 651).

Appellants arrived at Washington Square Park, a public park, shortly before 4 P.M. They did not act "in concert" or come together, but came separately, in different groups and from different directions (fols. 540-6, 615-7). Upon entering the park they sat on the park benches (fols. 175, 542, 546).

Just prior to their arrest appellants were sitting silently and in meditation, as is characteristic of Quaker religious meetings. They were not parading, demonstrating or shouting. They were not interfering with or obstructing the movement of any other person or of any vehicle, and were not urging anyone else to do so, or not to take shelter (fols. 336, 372-83, 542-9, 592-3, 620-1, 654, 673-9, 699-700, 727, 742, 751-3).

In and about the park, before, during and after the drill, there were television cameras and men, radio broad-

casters with microphones, newspaper reporters and photographers. They were interviewing appellants and were televising, broadcasting and photographing the occurrence. None of them ever took shelter or was asked or required to do so, or was arrested (fols. 350-5, 370-1, 481-2, 483-6, 542-7, 552-61, 698, 721-2, 725-34, 750-3, 763-4, 772-3). They were not exempted under the law from taking shelter (fol. 483). Other pedestrians watching the proceedings were not required to take shelter (fols. 534-5, 723-4). All of this appears from pictures taken at the scene at various stages. (Defs. Exs. I, J, K, L, M, N, O, P, Q, R, S; fols. 457, 553-81).

Some appellants carried signs into the park, which they laid down alongside the benches (fols. 561-91). The posters were confiscated by police (fol. 586). One poster said: "End War, the *only* defense against atomic weapons"; another said: "End War, the only *real* civil defense"; the third said "End War, they that taketh the sword shall perish by the sword" (a quotation from Matthew).

This drill was based on, and was in respect of, a mock, hypothetical or assumed air-raid and all of the directives and advance publicity referred to it as such (fols. 383-403, 421; Peo. Exs. 1, 2, 3; Defs. Exs. A, B, C; fols. 412-20, 959). There was no actual air-raid or bombing, and none was expected or threatened (fols. 391-3, 421). The drill was planned months in advance (fols. 392-3).

The "bombs" were all hypothetical (fols. 391-403). Actually, even the five hypothetical bombs had already been "dropped" at 1:45 P.M. in an earlier stage or phase of this drill—several hours prior to the event involved herein (fols. 395-6, 399-403). The theoretical or assumed bombing had "no bearing on the public participation" that started at 4:10 P.M. (fols. 397-8). Concededly, the falling

of the hypothetical bombs had nothing to do with the public participation in the drill (fol. 479).

The five imaginary or hypothetical bombs, dropped in the New York City area, were hydrogen bombs, four of one megaton strength (1,000,000 tons of T.N.T.) and one of five megatons (5,000,000 tons of T.N.T.). Everyone in the area of this park would have been killed (and were hypothetically killed) whether or not they took shelter (fols. 399-410, 421, 424-31, 476; Defs. Exs. A, B, C, D, E, F, G and H; Peo. Ex. 1, fols. 826-33). The theoretical casualties from the "bombing" in the New York City area were: "Dead", 4,372,939; "Injured", 1,698,293; in Manhattan, "Dead", 2,528,744; "Injured", 940,772—to say nothing of the later radiation "fall out" casualties.

The Civil Defense directives as to the drill were not mandatory in respect of public participation; and the Civil Defense publicity releases stated merely that the public "was expected to cooperate", rather than compelled to do so (Peo. Exs. 1, 2 and 3; Defs. Exs. C, D, E, F, G, H, I; fols. 826, et seq.).

Under said directives (Peo. Exs. 1, 2, 3), persons attending ball parks, race tracks and beaches and numerous types of vehicles with passengers and drivers were not required to take shelter (fols. 913-21, 921-51).

Appellants include seven Quakers, an Episcopalian, a Unitarian. Three were officially associated with American Friends Service Committee, a Quaker organization devoted to relief, education and service (fols. 536-8, 663-9, 682-3, 690-2, 697-701, 706-10, 739-41, 748-9, 769-76).

In not participating in this mock air-raid drill, all appellants were motivated by religious conscience and religious beliefs and duties, as well as by a humanitarian, moral and ethical conscience (fols. 728-9, 667-8, 683-5, 693, 697-700, 706-10, 742-3, 748-57, 760-6, 769-76). Their moti-

vating principles were set forth in a statement previously adopted by the American Friends Service Committee in respect of Civil Defense drills (Defs. Ex. T; R. pp. 318-9). They acted also in accordance with teachings of George Fox, Quaker founder. They deem these civil defense activities as a means of war preparation and are opposed to, and refuse to participate in, "things that relate to war or preparation of war" (fols. 593-608, 667-8).

Appellants were also motivated by a desire to test the constitutionality of the law and regulations and their legal rights (fols. 601-3, 655, 658, 683-5, 776-82). They regard this law, and the acts taken under it by the civil authorities, as unconstitutional, in violation of freedoms of press, speech, religion, assembly and petition—especially in absence of any clear, threatened and present danger. They took into consideration that this country is now at peace, not at war; that the Civil Defense laws had been continued in effect for over seven years (long after the stated "emergency" justifying their enactment); that our methods of civil defense are completely inadequate for any modern nuclear war; that taking shelter would offer no defense to the type of bombs hypothetically dropped in this drill; and that whether appellants took shelter or not would not save their lives or the lives of others (fols. 601-4).

(b) The Muste Case

Appellants are members of several organizations and religious bodies, to wit: Fellowship of Reconciliation, Catholic Workers, American Friends Service Committee (Quaker), all religious groups, and War Resisters League (a non-sectarian group). These organizations are pacifist and opposed to war and war demonstrations. Appellants include Catholics, Protestants and Jews, and Presbyterian and Quaker ministers (S.M. Nov. 16, 1955, pp. 85-6, 92-3).

Prior to June 15, 1956, said organizations had prepared a petition to be presented to the Mayor at his office in City Hall, City Hall Park (Defs. Ex. G, id. pp. 86-7, 91). On that date after first meeting in The Community Church in mid-town New York at 11:30 A.M. for a worship service for peace, a delegation thereof, appellants herein, went to City Hall Park to present the petition to the Mayor, during the ten minute alert.

Other groups of appellants went separately to the park, but prior to entering the park, distributed pamphlets on the street and held placards (Defs. Exs. A and D pp. 89-91, 102, 157-72, 189-90).

Appellants, variously, arrived in the park at about 1:55 P.M. and as they did so, they sat on the park benches (id. pp. 103, 112, 116-7). They engaged in no oral demonstration but were sitting silently, meditating or praying. Some had pamphlets on their person (id. pp. 16-8, 39-45; Defs. Exs. A, B, C, D, E, F). Several were holding placards (id. pp. 66-9). Those placards stated: "End War The Only Defense Against Atomic Weapons"; and "Let's Face the Truth—There is No Real Civil Defense Against H-Bombs". Those pamphlets and placards were subsequently confiscated by the police (id. p. 43).

Pictures in evidence show most of appellants just before the alert (Defs. Exs. I, J, K; id. pp. 117-18).

Hearn, an Auxiliary Police Colonel assigned to the Civil Defense drill at City Hall Park, arrived at 1:45 P.M. in uniform. At 2:05 P.M. the alert sounded. He "asked" appellants to take shelter, and this, he said, was the order referred to in the complaint (id. pp. 24, 30). Appellants did not take shelter. Almost immediately thereafter they were arrested, put into police patrol wagons and taken to the station house. They were arrested within five minutes after the sirens first sounded,

although persons had ten minutes to take shelter (id., pp. 16, 25, 26).

Muste had the original petition when arrested; but appellants were prevented from presenting it to the Mayor because of their arrest and incarceration (id. pp. 81-91, 167, 189-90). This petition urged the promotion of peace and of good will and mercy, the prevention of the catastrophe of atomic war, and the ending of war, preparations for war and promotion and publicizing of war defense demonstrations such as "the one now taking place". It was predicated on considerations of Christian and moral conscientious convictions.

Appellants had assembled in the park for the purpose of presenting that petition for a redress of grievances. The nature of their grievances was therein stated. Their assembly was entirely peaceable. Their pamphlets and their placards urged nothing but peaceful action. They did not commit or threaten any breach of the peace. They were orderly, quiet, dignified. They did not act with force or violence or recommend such action.

Appellants were not interfering with vehicular or pedestrian traffic or urging other citizens not to move or take shelter. They were not causing a crowd to collect and no crowd did collect (id. pp. 30-32). In acting as they did, appellants, were motivated by their religious, moral and ethical conscience and principles. Their principles and those of their organizations included opposition to war, war preparation, war exercise and demonstrations including air-raid drills (id. pp. 103, 114, 130-1, 173, 178-81, 185-90, 192-3).

All appellants understood, as was widely publicized, that this was a purely hypothetical air-raid (id. pp. 106-7). Muste testified (id. p. 105) that, in the event of a *real* air-raid, "As Quakers have done in the past and members of the Fellowship of Reconciliation and other of these

organizations, we will do everything in our power to save human life, to rescue the suffering, but would not do it as part of a military machine or under the military conscription act."

Muste testified, for himself and the others (id. pp. 107-8, 112, 114, 177-8, 182, 187-8, 193-4), that they could not consistently participate in these exercises because of their conscientious objections. He stated (id. pp. 107-108):

> "The drill was a part of war preparation under the Emergency Defense Act which plainly states that the act and what was done under it is a part of war preparation. It did not apply to an actual and present danger and just as a pacifist, I could not submit for example, to military conscription, neither could I obey orders under a law drawn for the purpose of preparing this country for defense including defense by atomic and biological weapons in war. This concept that we can be defended or that it is morally right to be defended is contrary to my practical convictions and to my Christian faith."

As appears from the directives issued by the office of Civil Defense and press releases given out by the Civil Defense authorities (People's Exs. 1, 2, 3 and 4; id. pp. 7-8, 46-50) the public merely was "invited," "urged" and "asked" to cooperate and participate in this drill. There was no proof of any authorized or official order requiring or compelling such participation, especially under pain of arrest and punishment for failure to do so.

Such directives and releases also evidenced that equal protection was denied to appellants. For example, thereunder, in this "exercise" of June 15, 1955, drivers of post office trucks, armored vehicles, gasoline and oil trucks and buses were permitted to remain in their vehicles;

passengers were not required to leave buses, in certain parts of the City; passengers on subway trains overhead and elevated trains were not required to leave trains; airplanes in the air were permitted to land; ferries and other watercraft were permitted to operate; trains were permitted to operate; drivers of newspaper trucks were not stopped; utilities crews on emergency calls were not required to seek shelter from the streets.

Other examples are as follows:

1. The New York State Defense Emergency Act, Section 100(1) provides, for "exemptions" to such persons as a clergyman or a member of a religious order while "engaged in duties" for a "recognized" church or religious organization. None of appellants was accorded such exemption status.

2. At Yankee Stadium 20,000 baseball fans were allowed to stay in their seats throughout the air-raid drill with consent of Civil Defense officers, and none were arrested (N. Y. Daily Mirror, June 16, 1955 at p. 3).

3. In Washington, D. C., the 850,000 civilians "just went on as usual, jamming the traffic filled streets" and "taking a to-hell-with it-all attitude". No arrests were reported (N. Y. Daily News, June 16, 1955, p. 4, O'Donnell).

4. In Peoria, Illinois, one of the cities scheduled to be "attacked by H-bombs", the "operation alert" was entirely ignored by the citizenry (N. Y. Herald Tribune, June 16, 1955, p. 1).

In Chicago, American Friends Service Committee (Quakers) sponsored a demonstration in the "Loop" during the exercise, distributing leaflets and carrying posters stating: "The best way to win a future war is to prevent it" (Chicago Daily Tribune, June 16, 1955, Part I, p. 2). None was arrested.

(c) Manner, Method and Time of Raising Federal Questions Sought to be Reviewed

The Federal questions sought to be reviewed by these appeals were raised by appellants at every stage of the proceedings below in all of the state courts having jurisdiction.

In *Peck*, the Federal questions were specifically raised in the Magistrate's Court preliminarily and on a motion to dismiss at the end of the *prima facie* case (R. pp. 168-172), which motion was denied (R. p. 177); and on motion to dismiss at end of trial (R. pp. 261-9) which was denied (R. pp. 273-4); and, also, in written briefs submitted on the trial (R. pp. 264-5).

In *Muste*, these questions were specifically raised in the Magistrate's Court preliminarily and on a motion to dismiss at the end of the trial (S.M. of Nov. 16, 1955, pp. 214, *et seq.*) and, also, in a written brief submitted on the trial. These questions were passed on by the Magistrate in his decisions overruling objection to jurisdiction of the Court and on the merits. *People* v. *Parilli*, 1 Misc. 2d 201 and 1 Misc. 2d 499.

In both cases these questions were again raised by appellants on their appeals to the Appellate Part of the Court of Special Sessions in Notices of Appeal and in the written, consolidated brief submitted to said Court on argument of said appeals.

In both cases these questions were again raised by appellants in the Court of Appeals in a printed filed brief and were passed on, as appears from the *per curiam* and dissenting opinions of that Court, 7 N. Y. 2d 76.

These questions were again raised in the Notice of Appeal to the United States Supreme Court filed in each case.

The Federal Questions Presented are Substantial

The Federal questions presented on this appeal are substantial and require plenary consideration, with briefs on the merits and oral argument, for their resolution:

1. These cases and the questions involved constituted a matter of first impression in the New York courts. For the first time was raised the constitutionality, under the Federal and State Constitutions, of the New York State Defense Emergency Act, inherently and as applied against alleged violators such as appellants. The Federal questions involved seem to be questions of first impression in this Court, since the constitutionality of the New York Act or similar defense acts of other states seem never to have been before this Court. The enactment of such state civil defense acts followed the passage of the Federal Civil Defense Act of 1950.

2. In the New York courts, the constitutionality of the New York State Defense Emergency Act under the Federal Constitution, as well as the State Constitution, was passed on in the written opinions of the Magistrate's Court (*Muste*) and of the Court of Appeals, and the validity thereof was upheld. A dearth of authority is cited in support of said opinions and the meager citations relied upon by the New York Courts do not appear to be relevant or analogous to the situation actually involved here. These questions should be authoritatively decided by this Court.

3. Three learned Judges of the New York Court of Appeals have stated, in their dissent, that the question of whether the New York State Defense Emergency Act,

as applied in these cases to appellants, violates provisions of the Federal Constitution is "a close and difficult one". The decision of the New York Court of Appeals, itself, was close, being 4 to 3. It is submitted that this "close and difficult" question should be decided by this Court.

4. The New York State Defense Emergency Act was enacted in 1951 and made effective July 1, 1951. Its provisions are extremely drastic—undoubtedly representing the most drastic powers and authority ever given to the State government in times of peace. Actually, many provisions of this Act are taken from the earlier New York State "War Emergency Act," (L. 1942, c. 445). It was enacted and justified as an emergency measure. It provided (Sec. 121) that the Act's duration would be only until July 1, 1952. Nevertheless, each year from 1952 to 1960, the New York State Legislature has extended the duration of the Act for one more year, most recently—to July 1, 1961 (L. 1952, c. 94; L. 1953, c. 61; L. 1954, c. 76; L. 1955, c. 27; L. 1956, c. 193; L. 1957, c. 200; L. 1958, c. 104; L. 1959, c. 133; L. 1960, c. 50).

Thus the one year "emergency" period already has been extended for a whole decade. The question arises as to how long such an "emergency" can be extended and whether it will be extended indefinitely.

This raises the question of whether said Act and the orders and directives thereunder do not represent an unconstitutional assumption, exercise and extension, in times of peace, of war powers by the State government, in violation of the Constitution.

5. Since these two cases arose, the situation has become much more serious and confusing and is continuing.

The Act has been reenacted from year to year, and prosecutions similar to those here, have been continued. A few examples will illustrate the point.

(a) During the Civil Defense drill in New York City on May 3, 1960, 150 persons refused to take shelter in City Hall Park; 300 students at the College of the City of New York, 150 students at Brooklyn College and 45 students at Columbia University refused to take cover. Some 35 persons were arrested in City Hall Park. (New York Times, Late City Edition, May 4, 1960, p. 1, col. 4 and p. 48, cols. 2-5.) At least 26 of the persons arrested in City Hall Park were sentenced to five days in jail by a City Magistrate. (New York Times, Late City Edition, May 7, 1960 p. 34, col. 5.)

(b) During the Civil Defense drill in New York City held on April 17, 1959, 22 persons were arrested in City Hall Park and several at other locations, including Quakers and Catholics. Arrested persons were sentenced to pay a fine of $25 or to spend ten days in jail. At least five spent ten days in jail. (New York Times, Late City Edition, April 18, 1959, p. 3, col. 2; April 25, p. 3, col. 8.)

(c) During the Civil Defense drill of May 6, 1958, in New York City, at least nine persons were arrested, including Quakers and Catholics, and were sentenced by a Magistrate to 30 days in jail. (New York Times, Late City Edition, May 7, 1958, p. 30, col. 1.)

(d) During the Civil Defense drill in New York City on July 12, 1957, ten persons, Catholics, were arrested in a park and were sentenced by a Magistrate to 30 days in the workhouse. (New York Times, Late City Edition, July 13, 1957, p. 3, col. 5; July 21, 1957, p. 35, col. 4.)

Several of the persons arrested in said drills are appellants in the two cases involved herein.

Considering that the misdemeanor charged is punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than $500, or by both (New York Penal Law, Sec. 1937), the extreme seriousness of such violations is readily perceived, quite apart from the increasingly large number of people involved in similar acts.

6. The legal questions involved on this appeal are novel, important and substantial.

(a) Constitutional freedoms of religion, speech, press, peaceable assembly and petition cannot be abridged or denied in absence of a clear, threatened or present danger. No such danger existed in law or in fact in the situation involved here. This Court frequently has stated and applied the doctrine that any attempt to restrict these freedoms can be justified only by a showing of "clear and present danger"; that is, that these freedoms can be restricted only to prevent "grave and immediate danger to interests which the State may lawfully protect"; only by a "clear, public interest being threatened, not doubtfully or remotely, but by a clear and present danger." For example, see *Schenck* v. *U. S.*, 249 U. S. 47, 52 (1919); *Whitney* v. *California*, 274 U. S. 357 (1927); *Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Thomas* v. *Collins*, 328 U. S. 516 (1945).

The substantive evil must be extremely serious and the degree of imminence extremely high before expressions can be punished. *Bridges* v. *California*, 314 U. S. 252 (1941); *Whitney* v. *California*, *supra*. In each case courts must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free expression as is necessary to avoid the danger. *Dennis* v. *U. S.*, 341 U. S. 494 (1951).

It is always open to Americans, as appellants are, to challenge a law abridging the freedoms of the First Amendment by showing that there was no emergency justifying it. *Whitney* v. *California*, 274 U. S. 357, 374, 376 S (1927).

Here, we are not dealing with an exercise of war power. No state of war existed. No state of martial law had been declared. The City of New York was not confronted with peril of [redacted] imminent air attack, as was California, for example, after Pearl Harbor and the Declaration of War against Japan. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81 (1943). Even in time of war the broad guaranties of the Bill of Rights protecting essential liberties are not suspended; and any restriction on the movement of citizens can be justified constitutionally only by a showing of "gravest imminent danger to the public safety". *Hirabayashi* v. *United States*, *supra*, at p. 116; *Kent* v. *Dulles*, 357 U. S. 116, 128 (1958).

The acts involved in these cases took place on June 15, 1955 and July 29, 1956 "in a time of peace", not "in a time of war". In cases involving constitutional liberties the term "in time of peace" should be liberally construed in order to give effect to such liberties and to do otherwise would be "at war with common sense" and "destructive of civil rights". *Lee* v. *Madigan*, 358 U. S. 228 (1959).

That no clear, present or threatened danger was involved in these cases is manifest from several non-disputable facts: (1) the drills or exercises involved were based on "mock", "hypothetical" and "theoretical" air raids and bombing attacks and all of the directives and press releases issued by the Civil Defense authorities referred to them as such. There was no actual air raid or bombing and none was expected or threatened. The drills had been planned and publicized months in advance. No "blackout"

was involved. It was daytime. In *Peck*, even the "theoretical" or "assumed" bombing had "no bearing on the public participation" that started at 4:10 P.M., because the hypothetical bombs had already been "dropped" at 1:45 P.M. in an earlier phase of that drill several hours prior to the act which caused the arrest of appellants; (2) under the Civil Defense directives and releases, numerous persons and vehicles were not required to take shelter, including persons attending ball parks, race tracks and beaches; (3) numerous persons, including newspaper, television and radio crews with equipment, were not required to take shelter but were permitted to operate in the parks throughout the drills, including all times when appellants were being arrested; (4) the Civil Defense directives and releases made it clear that public participation in these drills was not mandatory and compulsory but was merely "invited", "requested" or "urged".

Under these circumstances, the fact that appellants remained seated on park benches during the drill was entirely insignificant in relation to any question of "danger".

Appellants had read the advance newspaper releases of the Civil Defense authorities and knew these drills and exercises had no relation to any actual, clear, present or threatened danger, and they acted in light of that knowledge and that fact. They knew that no interest of the State was endangered.

(b) The Fourteenth Amendment has made applicable to the States the guaranties of the First Amendment, including the freedoms of religion and conscience, speech, press, petition and assembly. The States and all of their agencies are incompetent to enact laws or give sanction to acts which are in conflict with the prohibitions of the First Amendment. Some of the many cases so holding

are as follows: *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1936); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (1943); *Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Martin* v. *Strathers*, 319 U. S. 141 (1943); *Taylor* v. *Mississippi*, 319 U. S. 583, 589 (1943); *Douglas* v. *Jeannette*, 319 U. S. 157, 162 (1943); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Bates* v. *Little Rock*, 361 U. S. 516 (1960).

(c) Appellants' freedom of religion and conscience has been abridged. Appellants were in the act of exercising their religion and conscience and they were arrested while, and for, so acting.

The constitutional right of freedom of religion and conscience embraces two concepts—freedom to believe and freedom to act. *U. S.* v. *Ballard*, 322 U. S. 78, 86 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1939).

The First Amendment does not accord preferred treatment to any one type of religion. *U. S.* v. *Ballard*, *supra*; *Murdock* v. *Pennsylvania*, *supra*. All forms of religious activities are protected (except conduct offending public morals, health or safety); and whether those activities occur in a church or in streets or parks, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Murdock* v. *Pennsylvania*, *supra*. The protection is not restricted to orthodox religious practices. The right extends to the aggressive and disputatious, as well as to the meek and acquiescent. *Cantwell* v. *Connecticut*, *supra*; *Follett* v. *McCormick*, 321 U. S. 573 (1944).

It is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *U. S.* v. *Ballard*, *supra*.

The Bill of Rights, which guards the individual's right to speak, does not leave it open to public authority to

compel him to utter what is not in his mind or to participate in an exercise or ceremony against his religious conscience.

The conscience and religious convictions of these appellants would have been violated if they had been forced to participate in this mock air-raid drill, and they had a right to communicate their views to others by such means as placards, pamphlets and acts. *Board of Education* v. *Barnette*, *supra*, p. 624; *Taylor* v. *Mississippi*, 319 U. S. 583, 588-9 (1943).

The failure of appellants to participate in the air raid exercise did not interfere with the rights of others to do so. Cf. *Barnette*, *supra*, at p. 630.

To compel appellants to engage in this drill over a hypothetical bomb would compel them to act contrary to their conscience and religious beliefs. Cf. *Barnette*, *supra*, at p. 634.

In *Barnette*, *supra* (at p. 644), Mr. Justices Black and Douglas in concurring, stated:

> "Neither our domestic tranquility and peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation."

To compel these appellants to participate in this mock air-raid exercise would have ended in nothing for them but a frustration and denial of their religious and conscientious principles and would not have affected, in one iota, the outcome of the matter.

Concededly, these hypothetical bombs (if real) would have killed and destroyed everything and everybody within the area which included the two parks, in or out of shelters. The futility of the drills seems apparent

to appellants, and passage of time would seem to have made the futility of such drills even more manifest.

Appellants were justified in exercising their religion by a negative act, as in the *Barnette* case, *supra*, by a failure or refusal to participate in a war exercise.

The First Amendment of the Federal Constitution protects not only "beliefs" but the "free exercise" (i.e. acts) of religion. To urge, as it sometimes is, that a man is entitled to "freedom of religious belief" but not "freedom of religious action" is to rewrite the First Amendment. The word "belief" does not even appear in the Constitution; the expression used is "free exercise". "Liberty of thought soon shrivels without freedom of expression" (Frankfurter, J., *Dennis* v. *U. S.*, 341 U. S. 494 (1951), concurring).

The intention of the First Amendment was to completely protect freedom of conscience; and conscientious objection to war was a well recognized, time honored expression of such conscience.

The distinction between "positive" and "negative" is greater than mere semantics. To prevent a man from acting leaves his "belief" uncoerced; to make a man do an act contrary to his "belief" compels him to lie or appear to believe what is not in fact in his heart. To compel involuntary action is to coerce acts and beliefs. *Barnette*, *supra*, at pp. 630, 642; *Minersville District* v. *Gobitis*, 310 U. S. 586, 604 (1950), Stone, J., dissent.

The history of the struggle for religious liberty has centered around persons who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God. Chief Justice Hughes in *United States* v. *MacIntosh*, 283 U. S. 605, 631 (1931).

In this day when militarism threatens to engulf not only the individual but religion and the state, it is vital to protect religious freedom against militarism's inroads. It is illogical to hold that the Constitution protects a man from being compelled to salute the flag, *Barnette*, *supra* (remotely related to religious belief), but does not protect him in protesting and refusing to participate in war preparation exercises or mock air-raid drills in a day when a war could obliterate mankind.

(d) Appellants' rights peaceably to assemble and to petition have been abridged. The assemblages of appellants in the public parks were peaceable, dignified and to publicly communicate their views, by acts, pamphlets and placards, on public issues of the day—nuclear warfare, war and war preparations. No breach of the peace existed or was threatened. In *Muste*, they were carrying a petition to the Mayor, seeking a redress of grievances.

Under the Federal Constitution, appellants had the right so peaceably to assemble and to petition for a redress of grievances; and neither the State nor its agencies was justified in abridging and denying those rights. *DeJonge* v. *Oregon* 299 U. S. 353, 364-6 (1937); *Hague* v. *C.I.O.*, 307 U. S. 496, 513, 515 (1939); *Bates* v. *Little Rock*, 361 U. S. 516, 523 (1960).

(e) Appellants have been denied constitutional rights of free speech and press.

The rights of free speech and press embrace the right to communicate ideas by every possible media—acts, speech, printing, pictures, radio, television, movies. They necessarily embrace pamphlets, placards, periodicals, and every sort of publication affording a vehicle of information and opinion. *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938).

All ideas, in every field of human interest, are protected—unorthodox, controversial, hateful, unpopular. *Roth* v. *U. S.*, 354 U. S. 476, 484 (1957); *Thomas* v. *Collins*, 323 U. S. 516 (1945).

As pointed out by Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 179 (1943), the First Amendment "assures the broadest tolerable exercise of free speech, free press and free assembly, not merely for religious purposes but for political, economic, scientific, news or informational ends as well."

None of those classes of speech said to be beyond constitutional protection (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942)) is involved here.

The freedom to speak includes the right not to speak and the right to differ "as to things that touch the heart of the existing order." Citizens may not be forced to "confess by word or act" their faith in any orthodoxy in politics, nationalism, religion or other matters of opinion. cf. *Board of Education* v. *Barnette, supra; Terminiello* v. *Chicago*, 337 U. S. 14 (1949). Appellants should not be forced to confess by act of participating in such mock air raid drills their faith in the efficacy of war, preparation for war or drills against atomic bombs.

When heads of government urge peace and friendship and destruction of all weapons of war, through world-wide communication facilities, they are acclaimed. When a few pacifists do so, in honest practice of their Christian religion and in the name of humanity and conscience, by a modest, quiet expression in a small public park, they are swiftly tried and adjudged criminals, and even branded by the magistrate before whom they are arraigned, with being, theoretically, "murderers" (*Muste* case, S.M. of June 15, 1955, p. 9). Appellants say this is not equal justice under our constitutional law.

(f) Appellants have been denied equal protection of the laws and their privileges and immunities have been abridged.

No state or state agency may, under the Federal Constitution, make or enforce any law which abridges the privileges or immunities of citizens of the United States or denies to any person the equal protection of the laws, particularly in the exercise of First Amendment freedoms. *Niemotko* v. *Maryland*, 340 U. S. 268, 271-2 (1951); *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

The essence of the constitutional right to "equal protection of the laws" is that all persons similarly situated must be treated alike. The ideal of equal justice under law, to which our government is dedicated, is embodied in the Fourteenth Amendment. *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958).

Applying that constitutional principle here, there is no reasonable basis (1) for treating, differently, appellants who, in exercise of religious conscience, were sitting quietly in parks, and baseball fans, race track followers and bathers who, for amusement, were sitting, standing or walking around in ball parks, race tracks or bathing beaches, and yet, the latter were exempted and not arrested by the Civil Defense authorities; (2) for citizens of Washington and Peoria, for example, to be permitted to ignore this exercise, which was of national scope, without arrest or penalty; (3) for Civil Defense authorities permitting persons in buses, subway and railroad trains, ships and airplanes and drivers of numerous kinds of vehicles, to stay in the open during the alert, and at the same time subjecting appellants to arrest and punishment for sitting in a park and failing to take shelter; (4) for the exemption in the N. Y. State Defense Emergency Act (Section 101 (1)) in favor of members of a "religious

order" while engaged "in duties" for a "recognized church" or "religious organization," without including therein exemption of persons, such as appellants, who were acting in exercise of their religious duties, beliefs and conscience; (5) for permitting non-exempt newspaper, radio and television staffs to swarm in these parks throughout the drill, without taking or being requested to take shelter and without being arrested.

Moreover, there is no equal protection of the laws, or equal justice under the law, when appellants are accorded a different judicial process than all other persons charged with misdemeanors in the courts of the City of New York.

(g) Failure to include appellants within the class of "exempt persons" under the Act was discriminatory and denied them equal protection of the law as well as their freedom of religion. Section 100(1) of the New York State Defense Emergency Act defines "exempt person"; and Section 101(6) thereof provides that that Section shall not apply to exempt persons. These two sections are quoted in Appendix B, at pages 25a-26a. The statute does not define "duties" or "religious order" or "recognized church" of "religious organization" and these terms are left vague and uncertain, at best.

Several appellants are ordained clergymen. All, or most, are members of a religious order or organization. These people were engaged in the duties of their religious organizations and in carrying out the principles thereof. To them, what they were doing at the time in question was in the exercise of their religious beliefs and duties, just as much so as though they were attending a church service and singing hymns. For them, their acts constituted a religious activity.

It is not for the Courts to say that appellants' acts were not a religious practice or activity or in fulfillment of a

"duty". *Fowler* v. *Rhode Island*, 345 U. S. 67, 70 (1953) and *United States* v. *Ballard*, 322 U. S. 78 (1943).

(h) The New York State Defense Emergency Act in providing for, and as construed to permit, infringement of liberties of the people is unconstitutional (Sec. 2).

This Act states that "the least possible infringement of the liberties of the people, including the freedom of speech, press and assembly" is the "purpose of this legislation". However, under many decisions of this Court, it is submitted that no state may, constitutionally, infringe the liberties of the people, including the freedoms mentioned, to any extent or degree. The words "least possible infringement" are not only vague and ambiguous, but are without specified limitations.

(i) Appellants were deprived of due process of law and equal protection of the laws by the proceedings provided for in said Act and followed by the New York Courts.

Appellants in each case, were charged with a misdemeanor and the charges were heard and determined by a Magistrate, sitting as such (Secs. 101, subd. 2 and 102, New York State Defense Emergency Act). These Magistrates' Courts do not sit or hold court as Courts of Special Sessions. Appellants asserted that these proceedings were unconstitutional, under both State and Federal Constitutions.

We shall not pursue here, the argument under the State Constitution and decisions which divided the Courts of Appeals by 4 to 3. (See Opinions, Appendix A, pp. 1a-5a). But, it is contended here that those proceedings constituted a violation of the due process of equal protection clauses of the Fourteenth Amendment. As said in the dissenting opinion of the Court of Appeals, a defendent charged with a misdemeanor is entitled to a trial in a Court of Special

Sessions in New York City and a statute and judicial process which deprives him of that right is unconstitutional.

In the *Muste* case, the Magistrate sought to justify his decision on the ground that the Legislature, in enacting Section 102 of the New York State Defense Emergency Act, "intended to give the enforcement authorities in this important metropolitan city the quickest possible means of bringing alleged violators expeditiously before the court where the cases may be tried and determined with a minimum of delay, since the alleged violations involve so important a matter as civil defense". (Appendix A, p. 14a)

However, a violation of constitutional right cannot be justified on the ground of expediency. See *Duncan* v. *Kahanamoku*, 327 U. S. 304, 330-1 (1946) where Mr. Justice Murphy stated "The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws."

Not inconceivably, a trial before three judges in the calmer and more deliberate atmosphere of the Court of Special Sessions would have enabled appellants to have stood up better in defense of their constitutional liberties against the importunities of single magistrates and prevailing hysteria and prejudice—(cf. *Toth* v. *Quarles*, 350 U. S. 11, 17-19 (1955); *Lee* v. *Madigan*, 358 U. S. 228, 234 fn. (1959)—such as were manifested in the proceedings on the arraignment and trial in *Muste* (S.M. July 15, 1955; S.M. Nov. 16, 1955, pp. 1-219); see also, in *Peck*, S.M. of Oct. 31, Nov. 2, 1956 and Jan. 8, 1957, fols. 157-285). In denying appellants a preliminary hearing in the Magistrate's Courts and a trial in the Court of Special Sessions, and in permitting the Magistrate's Courts and a trial in the Court of Special Sessions, and in permitting the Magistrate's Courts to hear and determine these charges

amounting to a misdemeanor, the State of New York has deprived appellants of their liberty and property without due process of law and have denied them the equal protection of the laws.

(j) The legal authorities relied on in the opinions of the New York Courts clearly are not in point or analogous.

In the *Muste* case (*People* v. *Parilli*, 1 Misc. 2d, 201), were cited two state cases (See Appendix A, p. 19a) involving religious activities in private, not public, places. The events here occurred in public parks. No immoral practice, such as polygamy, is involved here. cf. *Reynolds* v. *United States*, 98 U. S. 145, 178, also cited below.

The case of *Girouard* v. *U. S.*, 328 U. S. 1 is not in point and does not support the proposition for which cited by the Court of Appeals (Appendix A, p. 1a). If anything it aids the position of Appellants, especially the Quakers.

Appellants were not trespassing on private property or engaged in immoral practices or practices inconsistent with the peace, health or safety of the State. They were peaceful, and urging peace. They were not advocating war, or the overthrow of the Government by force of arms or otherwise, but just the opposite. They were quietly pointing out the futility of modern warfare with massive destructive nuclear weapons, such as the hypothetical hydrogen bombs. They were not inciting anyone to riot or action, or creating a breach of the peace, or disturbing the public peace and safety, or acting disorderly, or interfering with traffic on public streets. In a time of peace, they were merely giving outward expression to their religious, conscientious beliefs in the exercise of their constitutional rights of free speech, press, religion, assembly and petition in public parks and in situations, involving

assumed conditions, where no actual, clear threatened or present danger was, or could be, involved.

These daytime exercises, based as they were on purely hypothetical conditions, in a time of peace, did not involve the safety of the state or of any person. Whether or not appellants took shelter, they and everyone else in the area of these parks would have been, hypothetically, obliterated. Compared to the thousands of people in the open ball parks, race tracks and beaches and to the innumerable vehicles on the streets and to the television, radio and newspaper crews milling about, the situation of these few appellants sitting quietly on park benches was insignificant, even microscopically.

The State had no justification for depriving Appellants of their constitutional rights and liberties.

The questions presented on this appeal are novel and important and of great public interest, not only in New York State but throughout the nation.

For all of the reasons mentioned, it is respectfully submitted that the Federal questions presented are substantial and that appellants' appeal herein to the United States Supreme Court should be allowed.

Respectfully submitted,

KENNETH W. GREENAWALT and
HARROP FREEMAN,
Attorneys for Appellants,
2 Broadway,
New York 4, New York.

APPENDIX A

Exhibit A

Per Curiam Opinion of the Court of Appeals of the State of New York and Dissenting Opinion, rendered December 30, 1959 (7 N. Y. 2d 76)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JAMES PECK, RALPH DI GIA, GEORGE WILLOUGHBY, HOLLIS WYMAN, JR., TOM RICK, ROBERT GILMORE, MARCUS COHEN, DALE BROTHINGTON, ALBERT UHRIE, PATRICIA DAW and ELIZABETH QUIGLEY, Appellants.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ABRAHAM J. MUSTE, KENT LARRABEE, EILEEN FANTINO, RALPH DI GIA, HENRY J. MAIDEN, BAYARD RUSTIN, HELEN RUSSELL, MARY ANN MCCOY, EDITH HORWITZ, PATRICIA RUSK, JAMES PECK, ROBERT FISHER, HUGH CORBIN, JACKSON MACLOW, DALE BROTHINGTON, ANDREW OSGOOD, MICHAEL KOVALAK and HENRY BABCOCK, Appellants.

Decided December 30, 1959.

Per Curiam. We agree that it was not unconstitutional for the Legislature in section 102 of the State Defense Emergency Act (L. 1951, ch. 784, as amd.) to give jurisdiction over these misdemeanors to Magistrates' Courts in New York City (N. Y. Const., art. VI § 18).

Appellants may constitutionally be compelled to take shelter during an air raid drill, a purely defensive measure within the class of nonaggressive activities recognized in *Girouard* v. *United States* (328 U. S. 61). Nor do we accept appellants' position that they were coerced into war preparation against their religious scruples. This was merely training in how to take shelter in the event

of an air raid, in the nature of a lifeboat drill at sea or a fire drill in a school.

In each case, the judgment of the Appellate Part of the Court of Special Sessions of New York City should be affirmed.

FULD, J. (dissenting). I cannot accept the view of the majority that the Legislature has the constitutional power to vest the Magistrates' Courts of the City of New York with jurisdiction to try misdemeanors.

> Section 18 of article VI of our Constitution reads: "Courts of special sessions and *inferior local courts of similar character* shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law, and the legislature may authorize them to try such offenses without a jury." (Emphasis supplied.)

The italicized words were added in 1925. I have always thought that their purpose was simply to make it clear that section 18 covers not only courts of special sessions, *so denominated,* but the equivalent of such courts, *though not so denominated,* which function outside New York City—namely, city courts, village courts and, perhaps, others. In other words, the phrase "inferior local courts of similar character" means inferior local courts of similar or equivalent jurisdiction.

Had section 18 of the Constitution been intended to apply to magistrates' courts, it would have simply read "Courts of special sessions and *other* inferior local courts"—eliminating the significant expression "of similar character". As the section now reads, however, the Legislature is without power to vest magistrates' courts

with jurisdiction to try misdemeanors since these courts are "inferior local courts", but not "inferior local courts *of a similar character*" to courts of special sessions.

In point of fact, prior to the enactment of the Defense Emergency Act (L. 1951, ch. 784, as amd.) whose constitutionality is before us for the first time on this appeal, the Legislature never attempted to empower magistrates' courts in New York City to try misdemeanors. Indeed, it is expressly provided by statute that in New York City the court of special sessions "shall have * * * exclusive jurisdiction to hear and determine all charges of misdemeanors committed within the city of New York" (N. Y. City Crim. Cts. Act, § 31). And the courts which have given thought to the subject have consistently declared that magistrates' courts neither had the power nor could be given the power to try such misdemeanors. (See *People* v. *Citarelli*, 247 App. Div. 53, 55; *People* v. *Aplaker*, 19 Misc 2d 602; *People* v. *Pershace*, 172 Misc. 324; *People* v. *Pray*, 87 Misc. 464, 467-468).

Furthermore, it should be noted that, when in 1915 the Legislature desired to empower a magistrate to try certain misdemeanors, it did not vest the magistrate with power to try them, but, instead, explicitly provided that the magistrate had to *sit as, and hold, a court of special sessions* and, in addition, that the defendant had to give his consent to such a trial (N. Y. City Crim. Cts. Act, §§ 130, 131). And, if he did not give his consent, the statute provided, then, the misdemeanor had to be tried by the justices comprising the court of special sessions. So strong did this court deem the requirement of consent that it decided that a defendant, having consented to a trial by a court of special sessions to be held by a par-

ticular magistrate, could not, without the defendant's further consent, be tried by any other magistrate. (See, e.g., *People* v. *Geltman*, 293 N. Y. 715, affg. 267 App. Div. 83).

If the Legislature had the competency to grant magistrates the power to sit as such and to hear and determine charges of misdemeanors, there would have been no need for the elaborate procedure set up in the New York City Criminal Courts Act. Moreover, and this, of course, is an important consideration, if we hold that the Legislature is under no constitutional inhibition, that body will then be able simply to provide that a New York City magistrate may try *any* misdemeanor without the defendant's consent and over his objection and protest. This may mean a more speedy disposition of cases, but that cannot decide the constitutional question presented. If a defendant charged with a misdemeanor does have a right to be tried in New York City by a court of special sessions, composed of three judges, it is impossible to justify a trial by a single magistrate over the defendant's objection. The provision, carefully written into the New York City Criminal Courts Act, requiring the defendant's consent was "considered necessary to avoid the serious constitutional objections which might otherwise have existed to the trial by a Magistrate's Court of offenses of the grade of misdemeanor." (*People* v. *Citarelli*, 247 App. Div. 53, 55, *supra;* see, also, *People* v. *Aptaker*, 19 Misc 2d. 602, 604, *supra*; *People* v. *Pershaec*, 172 Misc. 324, *supra*; *People* v. *Pray*, 87 Misc. 464, 467-468, *supra.*)

In sum then, a defendant charged with a misdemeanor is entitled to a trial in a court of special sessions—which

in New York City is a court consisting of three justices or, in certain specified cases, of one judge only if the defendant consents thereto—and a statute which takes from him his right to a trial by such a three-man court deprives him of something truly substantial and contravenes the constitutional provision discussed (N. Y. Const., art. VI, §18). Consequently, the Defense Emergency Act, insofar as it empowers magistrates' courts in New York City to try violations constituting misdemeanors, is invalid, and it follows that the magistrate who convicted the defendants before us lacked the power to try the charges.

In the view which I have thus taken, I do not reach the question—in my opinion, a close and difficult one—whether the Defense Emergency Act, as applied in this case to these defendants, violates provisions of the Federal and State Constitutions (U. S. Const., 1st and 14th Admts.; N. Y. Const., art. I, §§ 3, 8, 9).

The judgments appealed from should be reversed and the cases remanded to the Magistrates' Court for further proceedings.

Chief Judge Conway and Judges Desmond, Dye and Froessel concur in *Per Curiam* opinion; Judge Fuld dissents in an opinion in which Judges Van Voorhis and Burke concur.

In each case: Judgment affirmed.

Appendix A

Exhibit B

Opinion of Magistrate Hyman Bushel rendered September 28, 1955 (1 Misc. 2d 499).

OPINION

HYMAN BUSHEL, Magistrate

The defendants are accused of violating clause (b) of subdivision 2 of Section 101, of the *State Defense Emergency Act* (L. 1951, ch. 784, as amd.) which makes it a misdemeanor to violate or disobey any duly promulgated regulation or order, or wilfully to violate or disobey any official order by a person duly authorized, concerning the conduct of civilians and the movement and cessation of pedestrians and vehicular traffic.

At the threshold of the case, defendants pose a challenge to the jurisdiction of the magistrate's court to hear and determine these charges. Section 102 of the *State Defense Emergency Act* which is captioned "Jurisdiction of courts concerning violations" provides that "Courts of special sessions *outside* the city of New York and *city magistrates' courts in the city of New York*, in the first instance, shall have *exclusive jurisdiction to hear and determine* charges of violations constituting *misdemeanors or infractions* under this act or under any rule, regulation or order duly promulgated pursuant to this act, committed within the territorial jurisdiction of such courts" (emphasis supplied). The section then continues, "such *exclusive jurisdiction in the case of misdemeanors* shall be subject to removal to another court or to divestment on account of indictment or otherwise in the same manner

and to the same extent as is now or may hereafter be provided by law with respect to charges of misdemeanors generally in such respective courts" (emphasis supplied).

The challenge to jurisdiction advanced by defendants is that the Magistrate's Court, unless it sits as a Court of Special Sessions in conformity with the procedure specified in Sections 130, 131 and 132 of the *New York City Criminal Courts Act*, has no power to try any defendant for a misdemeanor, the defendants in the instant case not having given their consent and waiver that this Court sit as a Court of Special Sessions.

In *People ex rel. Comaford* v. *Dutcher*, (83 N. Y. 340 (1880)) the Court of Appeals pointed out that an amendment (Judiciary Article, 1869) to Section 26 of Article VI of the then (1846) State Constitution declared that "Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanor as may be provided by law". The Court added that such amendment was "no doubt designed to invest the legislature with authority to confer upon courts of Special Sessions full and exclusive jurisdiction in this class of cases which it was held not to possess under the decisions of the courts" (p. 242).

There followed a general revision of the Constitution of this State in 1894. However, Section 23 of the Constitution as then revised still specified that "Courts of Special Sessions shall have such jurisdiction of offences of the grade of misdemeanor as may be prescribed by law", thus repeating the identical language set up by the prior constitutional amendment.

In *People* v. *Pray* (dec. 1914) 87 Misc. 464, it was held that an attempt of the "legislature to confer jurisdiction

upon a city magistrate to try a defendant for an offense declared by law to be a misdemeanor is a violation of such defendant's constitutional rights" (pp. 467-468). Such holding was obviously based upon the foregoing Section 23 of the Constitution, which, as already noted, gave the Courts of Special Sessions *exclusive* jurisdiction of the offenses of the grade of misdemeanor.

It is further noteworthy that a constitutional convention was held in 1915, as the result of which there was submitted among others a proposed provision of Section 23 of article 6 as follows: "Courts of Special Sessions *and inferior courts of similar character* shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law" (emphasis supplied). It is significant that the only proposed change in the constitutional provision was the addition of the phrase, "and inferior courts of similar character". It was thus presumably intended to give the legislature, power to confer jurisdiction of the trial of misdemeanors, not exclusively to the Courts of Special Sessions but, additionally, "to inferior courts of similar character". The proposed amendment at that time, however was rejected.

Subsequently there were further amendments by virtue of which former Section 23 was eliminated and supplanted by what is now Section 18 of article 6 of the Constitution. It was in 1925, however, that there was incorporated into Section 18 the language as initially proposed in 1915 so that Section 18 of article 6 of the Constitution of this State now contains the following provision:

> "Courts of special sessions *and inferior local courts of similar character* shall have such juris-

diction of offenses of the grade of misdemeanors as may be prescribed by law, and the legislature may authorize them to try such offenses without a jury." (Emphasis supplied.)

There has been a long line of cases stemming from *People ex rel. Comaford v. Dutcher*, *supra*, and *People* v. *Pray*, *supra*, which would support the defendants' contention, that a Magistrate's Court has no jurisdiction to try misdemeanors unless in conformity with Sections 131-133 of the New York City Criminal Courts Act (*People* v. *Citarelli*, 247 App. Div. 53; *People ex rel. Gross* v. *Adams*, 270 App. Div. 607, 611, 612; *People* v. *Seidman*, 266 App. Div. 793; *People* v. *Pershace*, 172 Misc. 324; *People* v. *Aptaker*, 25 N. Y. S. 2d 950, 952; *People* v. *Schachet*, 181 Misc. 769.

It is noteworthy that the legislation (now Sections 131-133 of the New York Criminal Courts Act) empowering a Magistrate to sit as a Court of Special Sessions was first enacted in 1915 (*Laws of 1915* Chap. 531; *People* v *Citarelli*, *supra*, p. 55). Significantly enough that was the year in which, as already indicated, the proposed revision of the constitutional provision treating with legislative authority concerning jurisdiction as to the trial of misdemeanors to include in addition to Courts of Special Sessions, "inferior local courts of similar character", failed of enactment.

Since the legislature did not then receive constitutional authority to confer jurisdiction to try misdemeanors upon "inferior local courts of similar character" to that of Courts of Special Sessions, the legislation so enacted (now Sections 131-133 of the New York Criminal Courts

Act) was devised to treat with the problem as it then existed. Indeed, it has been judicially recognized that "these provisions were no doubt considered necessary to avoid the serious constitutional objections which might otherwise have existed to the trial by a Magistrate's Court of offenses of the grade of misdemeanor" (*People* v. *Citarelli, supra*, p. 55; *People* v. *Aptaker, supra*, p. 952).

Understandably, therefore, a Magistrate under the procedure set up by Sections 131-133 of the New York City Criminal Courts Act actually sits as a Court of Special Sessions having the full power that a Court of Special Sessions held by three justices would have (*People* v. *Citarelli, supra*, p. 56).

However, the rejected revision to empower the legislature to confer jurisdiction of the trial of misdemeanors to "inferior local courts of similar character" to Courts of Special Sessions was incorporated in our State Constitution in 1925.

The inclusion of the previously rejected revision must be accorded the significance that it is entitled to receive under all these circumstances, namely, that it was intended, as the added phrase plainly indicates, to extend the legislative authority as to the jurisdiction to try misdemeanors to "inferior local courts of similar character" to Courts of Special Sessions; such revision unsuccessful in 1915 and successful in 1925 otherwise would have been utterly meaningless.

If the added clause was designed to, and as it did, empower our law makers to pass legislation conferring jurisdiction as to the trial of misdemeanors not alone

upon Courts of Special Sessions but also upon "inferior local courts of similar character" then the question arises, —does a Magistrate's Court fall within the latter category? The answer must be in the affirmative for that is clearly recognized in the legislation (Sections 131-133 of the New York City Criminal Courts Act) which, under the procedure there set forth empowers a single magistrate to exercise all of the powers of a Court of Special Sessions. Moreover, the New York State Defense Emergency Act, here involved, expressly recognizes that the two courts are of similar character under Section 102, which, in unequivocal language, that permits of no misconstruction or judicial interpretation, confers jurisdiction "to hear and determine charges of violations constituting misdemeanors or infractions under this Act" *exclusively* upon "Courts of Special Sessions outside of the City of New York and City Magistrates' Courts in the City of New York".

As to offenses designated as "infractions" which are below the grade of misdemeanors, jurisdiction of the Magistrate's Court in the City of New York is not and cannot be challenged (*People* v. *Schacher*, 181 Misc. 769 [*supra*] 1st. 47 N.Y.S. 2d 371). As to the violations constituting misdemeanors, it must be concluded from the foregoing that the legislature has the constitutional power to confer jurisdiction as to the trial thereof upon "inferior local courts of similar character" to Courts of Special Sessions in which category a Magistrate's Court may be rightly classified.

If this Court were simply to sit as a Committing Magistrate and were to hold these prosecutions for trial in

the Court of Special Sessions that Court could be met with the challenge that the legislation here provides that "City Magistrate's Courts in the City of New York in the first instance shall have *exclusive jurisdiction* to hear and determine charges of violations constituting misdemeanors". Defendants by their challenge to the jurisdiction of this Court and their contention that jurisdiction exists only in the Court of Special Sessions, could not be held to have consented or acquiesced in the conferring of jurisdiction upon the Court of Special Sessions that did not there exist and which this statute places *exclusively* in the Magistrate's Court (cf. *People* v. *Geltman*, 267 App. Div. 83, 84, 85). Defendants thus "may escape any criminal prosecution" (cf. *People ex rel Gross* v. *Adams*, 270 App. Div. 607, 612).

It is true that in *People* v. *Seidman* (266 App. Div. 793, *supra*), where the defendant was prosecuted for a violation of Section 101, subd. 2 of the then New York State War Emergency Act (L. 1942, ch. 544, as amd.) the Appellate Division of the Second Department ruled that a sitting Magistrate without constituting himself a Court of Special Sessions in conformity with Sections 131-133 of the New York City Criminal Courts Act "was without jurisdiction to try the defendant". But that prosecution, as an examination of the record reveals, was on a complaint made October 29, 1942 and the defendant was tried and convicted on November 16, 1942. However, it was not until March 30, 1943 when the War Emergency Act was amended by the addition of a new section, Section 101-a entitled "Jurisdiction of Courts concerning violations" identical in language to Section 102 of the present

act bearing the same caption. Without enabling legislation such as provided in former Section 101-a or in present Section 102, expressly conferring jurisdiction to try those misdemeanors upon a Magistrate's Court, no such power would exist. Hence *People* v. *Seidman*, *supra*, was correctly decided but does not constitute an authority supporting these defendants' position.

People v. *Aptaker* (25 N. Y. S. 2d 950, *supra*), involved an alleged violation of the Administrative Code relating to a cigarette stamp tax which the Code defined as a misdemeanor. The Code provided that "the violation of any provision of this Title may be tried in the Municipal Term of the Magistrate's Court" (p. 953). As the Court quite properly pointed out "The Municipal Assembly of the City of New York is without power to legislate concerning such jurisdiction or procedure. The power to establish courts of inferior criminal jurisdiction and to prescribe their jurisdiction and procedure obviously resides in the State Legislature (Const. Article VI, Section 18)" (p. 953). Here, as we have seen, the State Legislature did act to confer jurisdiction upon the Magistrate's Courts in the City of New York to try these misdemeanors, which was constitutionally proper under the aforesaid provision giving the Legislature the right to confer such jurisdiction upon "inferior local courts of similar character" to that of the Court of Special Sessions.

Counsel for defendants attach significance to the concluding statement in Section 102 of the legislation here under consideration which provides that "Such exclusive jurisdiction in the case of misdemeanors shall be subject to removal to another court or to divestment on account of indictment or otherwise in the same manner and to the same extent as it is now or may hereafter be provided

by law with respect to charges of misdemeanors generally in such respective courts". That concluding statement only reinforces the conclusion reached here, that the Magistrate's Court in this situation was simply treated as a court in the same category as that of Special Sessions and, accordingly, the legislative purpose was to give the defendants all the rights that a defendant now possesses with respect to having a misdemeanor prosecuted by an indictment pursuant to Section 31, subd. 1(c) of the New York City Criminal Courts Act in order to obtain a jury trial.

It is obvious that the legislature in conferring exclusive jurisdiction upon the Magistrate's Court in the City of New York, in the first instance, to hear and determine violations under this act, whether infractions or misdemeanors, intended to give the enforcement authorities in this important metropolitan city the quickest possible means of bringing alleged violators expeditiously before the court where the cases may be tried and determined with a minimum of delay, since the alleged violations involve so important a matter as civil defense.

It is therefore concluded that these misdemeanors must be tried and determined in this Court. Accordingly, the date for trial is set for October 17, 1955 which will give these defendants ample time in view of the importance of the constitutional challenge made to this Court, to continue such challenge by a proceeding under Article 78 of the *Civil Practice Act* in the nature of the ancient writ of prohibition or by such other means as the defendants may be advised.

Dated, New York, September 28, 1955.

HYMAN BUSHEL
City Magistrate

Appendix A

Exhibit C

Opinion of Magistrate Hyman Bushel rendered, after trial, on December 22, 1955 (1 Misc. 2d 201).

OPINION

HYMAN BUSHEL, Magistrate

The defendants are accused of violating clause (b) of subdivision 2 of Section 101, of the *New York State Defense Emergency Act* (L. 1951, ch. 784, as amd.) which makes it a misdemeanor to disobey any official order of a person duly authorized, concerning the conduct of civilians and the movement and cessation of pedestrians and vehicular traffic.

At the outset defendants posed a challenge to the jurisdiction of the Magistrate's Court to hear and determine any charges declared by law to be a misdemeanor. The jurisdictional objection was overruled (*Peo.* v. *Parilli*, 1 Misc. 2d).

A sufficient time was allowed to "give these defendants ample time in view of the importance of the constitutional challenge" as to jurisdiction "to continue such challenge by a proceeding under Article 78 of the *Civil Practice Act* in the nature of the ancient writ of prohibition or by such other means as defendants may be advised". Defendants, however, elected to proceed before me but, of course, continued to urge the jurisdictional objection which I have held and still hold to be untenable.

Certain of the defendants entered a plea of guilty; the charges against some were dismissed; the others pleaded "not guilty" and proceeded to trial.

Appendix A

On June 15, 1955 a civil defense air raid drill was promulgated pursuant to appropriate official directives issued to and by the heads of all city departments and agencies engaged in civil defense and to all commands of bureau headquarter divisions, Women's Bureau Auxiliary Police, Police Department, Division of Civil Defense and Auxiliary Police.

Defendants, a group of avowed pacifists, congregated at City Hall Park shortly before the time set for the sounding of the air raid sirens signalizing the commencement of the drill. The wilful purpose of the defendants to disobey the official orders issued in connection with the drill conducted under the New York State Defense Emergency Act is conclusively established by the following testimony (Dr. Muste):

> "Q. Didn't you and the other defendants go to City Hall with the specific intentions that when the air raid was sounded you would not go to any shelter? A. We were determined that we would not participate in the air raid.
> Q. You mean you would stay there? A. Correct.
> Mr. Greenawalt: There's no question about that.
> The Court: You admit that?
> Mr Greenawalt: Why, certainly."

The reason for this wilful disobedience was expressed as follows by the same witness:

> "The drill was a part of war preparation under the Emergency Defense Act which plainly states that the act and what was done under it is a part of war preparation. It did not apply to an actual and present danger and just as a pacifist, I could not submit for example, to military conscription,

> neither could I obey orders under a law drawn for the purpose of preparing this country for defense including defense by atomic and biological weapons in war. The concept that we can be defended or that it is morally right to be defended is contrary to my practical convictions and to my Christian faith."

Defendants, admittedly, refused to obey police instructions to take shelter:

> "Q. Did you hear him state that there would be an air raid drill? A. I heard officers state that there was a raid and people were told to take shelter.
>
> Q. Isn't it a fact after hearing this you stayed where you were? A. Yes, sir."

However, not all defendants were motivated by religious scruples. Although divers defendants were members of an organization known as the War Resisters League, certain of them preferred to base their activities on other than religious grounds, as the following testimony (Ralph Digia) evinces:

> "Q. Now, will you give the explanation? A. My grounds were based on humanitarian, ethical reasons.
>
> Q. You mean the same as moral, as ethical—you mean as distinguished from a denominational religious ground? A. From a religious reason."

Defendants' counsel elicited this testimony from the same witness, the office manager of the War Resisters League:

> "Q. Now, Mr. Digia, in order to try to shorten this thing we have asked you if you agree substan-

tially with Dr. Musty's testimony and you told me there is one point you'd like to clarify. A. Yes, sir.

Q. Will you tell us what this is please? A. Well, Dr. Muste pointed out the religious motivation of of people who partook and I wanted to bring out that there were non-religious people involved in this thing.

Q. I think you did bring that out. Are there both religious and non-religious people connected with the War Resisters League? A. Yes, there are.

Q. You are one of the non-religious people? A. Yes."

It is clear, that whether religious or non-religious defendants as pacifists, intended to and did wilfully disobey the official orders incident to the air raid drill that was being conducted under the New York State Defense Emergency Act.

At the conclusion of the trial, and in defendants' brief, it was and is urged that abridgment of the defendants' activities at the time of the air raid drill which were designed as a protest against war, was in violation of their constitutional rights and involved "prohibition of the free exercise of religion and conscience". Other applicable provisions of the Bill of Rights also cited and stressed, include those guaranteeing freedom of speech, the right peaceably to assemble and to petition the Government.

The free exercise of religion is, of course, guaranteed by the first amendment to the Constitution of the United States and, likewise, by Section 3 of Article 1 of the Constitution of this State, but the right so secured, as our

State Constitution aptly points out, does not "justify practices inconsistent with the peace or safety of this State" (Art. 1 § 3). In *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, 304, Mr. Justice ROBERTS pointed out that the constitutional safeguard here invoked "embraces two concepts, —freedom to believe and freedom to act" and, appropriately observed that "the first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Indeed long ago it was noted by the Supreme Court that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" (*Reynolds* v. *U. S.*, 98 U. S. 145, 166). I have heretofore had occasion to hold that certain religious activities (as distinguished from religious beliefs) although peaceably and devoutly conducted in good faith, may nonetheless give rise to a criminal charge of misdemeanor and result in conviction notwithstanding defendant's contention that such "conviction will result in abridgment of the liberties of press and worship guaranteed by the First and Fourteenth Amendments of the United States Constitution and by the Constitution of the State of New York" (*People* v. *Thorpe*, 198 Misc. 462, 464). To paraphrase the language of the Court of Appeals in *Watchtower Bible & Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 348, this Court knows of no case which extends the reach of the Bill of Rights to the activities of these defendants so as to grant sanction and immunity for a wilful violation of law.

One can readily share defendants' abhorrence of war. All of the appropriate provisions of the Bill of Rights may

be invoked to further the legitimate objectives of this or any other group of pacifists. However, City Hall Park at the time of an air raid drill promulgated in the interests of national defense was "hardly an appropriate place at which to demand the free exercise of those ancient rights" (*Watchtower Bible & Tract Soc.* v. *Metropolitan Life Ins. Co., supra,* p. 348).

The air raid drill and the official directives and orders issued in connection therewith were well within the purview of the legislation here involved (New York State Emergency Defense Act, § 3, subd. 3).

Accordingly, I find all remaining defendants guilty. Considering the circumstances I believe that this conviction will give defendants adequate warning that motives, however sincere or worthy, cannot "justify practices inconsistent with the peace or safety of this State". Sentence is suspended.

Dated: New York, December , 1955.

HYMAN BUSHEL
City Magistrate

Appendix A

Exhibit D

Order and Judgment of the Court of Appeals of the State of New York in People etc. *v.* James Peck, & ors.

No. 119.

THE PEOPLE &c.,

Respondent,

vs.

JAMES PECK, & ORS.,

Appellants.

BE IT REMEMBERED, That on the 3rd. day of April in the year of our Lord one thousand nine hundred and fifty-nine, James Peck, & Ors., the appellants in this cause, came here unto the Court of Appeals, by Kenneth W. Greenawalt and Harrop Freeman, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Court of Special Sessions of the City of New York. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Kenneth W. Greenawalt, of counsel for the appellants, and by Mr. Peter Preiser, of

counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same is hereby affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, December 30, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

Appendix A

Exhibit E

Order and Judgment of the Court of Appeals of the State of New York in People etc. v. Abraham J. Muste, & ors.

No. 141

THE PEOPLE &c.,

Respondent,

vs.

ABRAHAM J. MUSTE, & ORS.,

Appellants.

BE IT REMEMBERED, That on the 17th. day of April in the year of our Lord one thousand nine hundred and fifty-nine, Abraham J. Muste, & ors., the appellants in this cause, came here unto the Court of Appeals, by Kenneth W. Greenawalt and Harrop Freeman, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Court of Special Sessions of the City of New York. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Kenneth W. Greenawalt, of

counsel for the appellants, and by Mr. Peter Preiser, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, December 30, 1959.

I HERETO CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

APPENDIX B

Pertinent provisions of New York State Defense Emergency Act.

ARTICLE 8

VIOLATIONS AND PENALTIES; PEACE OFFICERS

§ 100. DEFINITIONS

As used in this article the following terms shall mean and include:

1. "Exempt person." A member of a municipal or volunteer agency or a member of the armed forces and military services acting within the scope and in the proper performance of his duties as such; a clergyman or a member of a religious order while engaged in duties for a recognized church or religious organization; and such other class of persons as may be exempted by regulations of the commission or the council.

2. "Person duly authorized." A member of a municipal or volunteer agency wearing or displaying a distinguishing brassard or other insignia indicative of authority.

* * * * *

§ 101. VIOLATIONS AND PENALTIES

* * * * *

2. Any person who shall violate or disobey any duly promulgated regulation or order, or who shall wilfully violate or disobey any official order by a person duly authorized, concerning (a) the effective screening or extinguishment of all lights, lighting devices and appliances, or (b) the conduct of civilians and the movement and cessa-

tion of pedestrian and vehicular traffic sh
misdemeanor.

6. The provisions of this section sh
exempt persons to the extent prescribed
order of the council or commission.

§ 102. JURISDICTION OF COURTS CONCERN

Courts of special sessions outside the c
and city magistrates' courts in the city
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ARTICLE I

SHORT TITLE; DEFINITION

§ 2. DECLARATION OF PURPOSE AND FIN

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NING VIOLATIONS

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Office-Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 437

JAMES PECK, *et al.*,
Appellants,

v.

NEW YORK,
Appellee.

ABRAHAM J. MUSTE, *et al.*,
Appellants,

v.

NEW YORK,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

RESPONSE BY NEW YORK, PURSUANT TO THE COURT'S DIRECTION, AS TO THE DISCRIMINATION ISSUE RAISED IN APPELLANTS' JURISDICTIONAL STATEMENT

FRANK S. HOGAN
District Attorney
New York County

HAROLD ROLAND SHAPIRO
Assistant District Attorney
Of Counsel

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On Appeal from the Court of Appeals of the State of New York

RESPONSE BY NEW YORK, PURSUANT TO THE COURT'S DIRECTION, AS TO THE DISCRIMINATION ISSUE RAISED IN APPELLANTS' JURISDICTIONAL STATEMENT

Statement

In each case, appellants appeal from the final order and judgment of the Court of Appeals of the State of New York entered on December 30, 1959, affirming (4-3) the

order and judgment of the Appellate Part of the Court of Special Sessions of the City of New York, First Department, entered May 29, 1958, affirming, without opinion a judgment of the Magistrates' Court rendered December 22, 1955, in the *Muste* case and January 17, 1957, in the *Peck* case, convicting the appellants, after trial, of the misdemeanor of WILFUL DISOBEDIENCE OF AN OFFICIAL ORDER [New York State Defense Emergency Act, §101, subd. 2(b)]. The appellants in the *Muste* case received suspended sentences (Proceedings of Dec. 22, 1955, p. 13) and the appellants in the *Peck* case received sentences of a fine of $25, or in the alternative, 5 days in prison (f. 820).*

THE EVIDENCE

The facts in the Muste Case

Participating in a national civil defense test exercise known as "Operation Alert 1955", pursuant to standards and directives promulgated by the New York State Civil Defense Commission, with the objective, among others, of increasing public knowledge and training in civil defense survival techniques (Peo. Exh. 1., p. 1 of standards), the New York City Office of Civil Defense issued a directive to the city's civil defense agencies (Peo. Exh. 1, pp. 9-12). It contained elaborate instructions regarding persons at home, in vehicles and on the streets, and, as to the latter, declared that non-civil defense persons were to "seek shelter immediately upon the sounding of the Apple Jack [alerting siren] signal" (ibid, p. 12). The city's Force was advised, "Full cooperation is expected from the general public * * * every person except members of the Force shall seek shelter in the same manner as if an actual air

* References preceded by the symbol "p." are to pages of the typewritten record of the Muste case. References preceded by the symbol "f." are to folios of the printed record in the Peck case.

raid had occurred?" (Exh. 3, p. 8, j). The appellants (except Maclow), members of various pacifist organizations, admittedly went to City Hall Park pursuant to a preconceived organized plan (Def. Exh. G) not to participate or take shelter if ordered to do so (pp. 100, 102, 103-4, 107-8, 112, 113, 114, 138-9, 164-5), and seated themselves on benches (pp. 16, 24, 28). Ordered by Auxiliary Police Colonel Hearn, after the alert had sounded, to go to bomb-proof shelters provided by the City, one being in City Hall and the others being across the street (24-5, 35-6), and although one of them testified that he had a petition with him for presentation to the Mayor, appellants admittedly remained seated and deliberately refused to comply (pp. 112-6, 141, 172). Thereupon, they were arrested for refusing to obey the official order thus given to take shelter. Maclow, who was also arrested for refusing to obey the order, had been parading around the periphery of the park with a sign against A and H Bomb explosions (pp. 195-200).

The defense elicited from Colonel Hearn that to his knowledge no clergymen or members of a religious order were exempt from the drill (56). None of the defendants told the officer that they were clergymen or that they had permission to be exempt (56).

The directives provided that in outlying sections, "where no adequate shelter is available", passengers could remain in busses; subways were to be allowed to operate; overhead, trains were to be permitted to continue to nearest station and passengers allowed to remain within; interstate and intrastate trains entering or leaving the city, and ferries and other watercraft were permitted to operate; airplanes were permitted to land, and those on the ground were to remain so (Exh. 3, Directive, p. 8, at G, H and I); and drivers of newspaper trucks making deliveries were to be allowed to continue (Exh. 2).

The facts in the Peck case

The standards for a civil defense exercise in New York State, promulgated by the New York State Civil Defense Commission as part of a national civil defense test known as "Operation Alert 1956," and the purposes and requirements for public participation were, insofar as here relevant, identical with those in the *Muste* case (ff. 840-90), with the addition that, for the purposes of this particular drill, people at beaches and amusement parks should seek the best available shelter, and people at race tracks and ball parks should remain in their seats and obey the management's instructions (Peo. Exh. 2, ff. 851-2; cf., Exh. 3, "33" at f. 949).

The appellants, admittedly because they disagreed with the civil defense policy of this country as restrictive, ineffectual, morally or spiritually wrong, or for all those reasons, went to Washington Square Park in accordance with a preconceived plan to test the constitutionality of the law (ff. 593-608; 615, 617, 655, 682, 683-4, 691, 708, 776). They had previously notified the police that they would be at the northwest corner of the park, and both the police and TV men were there "because they know we go where we say we go" (ff. 617-19). As their leader testified, "Anyone that came in for participation in this immediately sat down on the bench" (ff. 545-6). They refused to move and take available shelter during the alert, notwithstanding Deputy Chief Hearn's orders to do so, whereupon he arrested them for disobeying his orders (ff. 327, 337-9, 342-5, 371-2, 550). Various appellants spoke with some newspaper, radio and television men, who were around (ff. 547-8, 552). Gilmore, appellants' leader, admitted having no doubt in his mind that "we were required to take shelter during this drill * * * I knew we had to" (612).

No Substantial Federal Question is Presented by the Claim of Discrimination

The appellants claim unconstitutional discrimination [pp. 31-3 (g) and (h)] in that there is no reasonable basis for requiring them to take shelter, whereas (1) the regulations did not require persons at ball parks, race tracks, bathing beaches, and in certain public conveyances, to seek shelter; (2) news photographers, reporters and television crews were not required to seek shelter; (3) many citizens of Washington, D. C. and Peoria, Ill., ignored the exercise, although it was of national scope, and were not arrested; (4) the State Defense Emergency Act contained provisions supposedly exempting a member of a religious order who engaged in duties for a church or religious organization (citing §100, subd. 1; §101, subd. 6). In addition [pp. 33-5, (i)], they claim discrimination because the legislature (which was held, below, to have been duly authorized by the state constitution) required that all misdemeanors under the Act be tried in the N. Y. City Magistrates' Court, whereas it had given primary misdemeanor jurisdiction in other cases to the Court of Special Sessions.

These claims present no substantial federal question, for the reasons set forth below in considering the claims *seriatim*. We note here, generally, that there has been no showing of "invidious discrimination" in the statute [*Morey* v. *Dowd* (1956) 354 U. S. 457, 463, quoting *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489]. The Constitution does not require situations different in fact to be treated the same [*Goesart* v. *Cleary* (1948) 335 U. S. 464, 466]. Nor, indeed, is there any "requirement of equal protection that all evils of the same genus be eradicated or none at all" [*Railway Express* v. *New York* (1949) 336

U. S. 106, 110]. Particularly is this so, as will be seen, as to the practical defense emergency situations with which the formulators of the directives herein were confronted in the particular experimental test drills they devised. To the extent that some pedestrians may have escaped participation in a test program so vast and understaffed, dependent as it was, for proper enforcement, upon volunteers, we need only note that failure by the authorities to achieve a 100% enforcement of the law is hardly a defense to a criminal prosecution. Lastly, as will be seen, the appellants had no federally-protected right to have their instant misdemeanor tried in a court other than the duly constituted court to which the legislature, in the statute, gave jurisdiction pursuant (as was held by the New York Court of Appeals) to authority vested in the legislature by the state constitution.

As we show here seriatim, there is no substance to claims (1), (2) and (3), supra.

(1) The appellants, in making claims addressed to the exemption, by the authorities, of people at ball parks, race tracks, beaches, etc., from the requirements to take shelter, ignore the basic functions of a civil defense alert *test* exercise. Among others, they enable the authorities to determine, from observing the drill-in-action as projected for the particular occasion whether the public responds in a manner conforming to notices, and whether changes or variations should be tried or made in any phase of a future test. Basically, the function of a drill is to train wardens and the general population to act during the drill *as if there were* an attack. "[U]nless people are so 'shelter conscious' that they will go *automatically* to a shelter area on an Alert, all your teaching may be in vain" (Warden's Manual [Thomas E. Dewey, Governor] p. 93). On the other hand, the authorities, faced with the practicalities of the situation, either because other shelter was not avail-

able to occupants of buses in outlying areas or to the masses of people sitting in the stands at ball games and race tracks, directed that such persons sit where they were during the practice alert, while persons at amusement parks and beaches were expected to find the best available shelter. In addition, "One air raid warden is needed for every 75 people in a target city" (Governor Dewey's special message to legislature recommending enactment of the instant law, Jan. 8, 1951). On this basis, it was highly reasonable to require that the vast crowds, who had nowhere to go for shelter, sit where they were; rather than to attempt to handle such an unwieldy mass, with its potential for panic unless adequately directed; and to train them to remain seated under such circumstances, obeying the management's orders, to avoid panic. Moreover, we note that the rules applicable to ball games, race tracks, beaches and amusement parks were added for the purposes of the 1956 drill, and accordingly they provided a means for observing how the public would react in the places indicated. Beyond this, the authorities could certainly determine, as part of a given drill, that certain types of transportation facilities should keep rolling. Those situations were certainly not the same as that of the appellants in City Hall Park and Washington Square Park, since shelters were available, and they were ordered to take shelter by an available warden. Of course, the warden's attention to appellants' recalcitrance precluded, to that extent, his attending to his duties with regard to other persons.

(2) As far as news reporters are concerned, we know of no time or place of danger in the history of this nation, when that class of persons has not been allowed relative freedom of access to danger zones. Although nothing was spelled out in writing in the directives, we note that the presence of the newsmen conformed to one of the purposes and duties of the Commission, namely, to provide "Programs for the training and *information* of the public, including but not limited to practice blackouts, drills or tests"

(§21, subd. i), and the concomitant duty of the city authorities, among other things to "Conduct tests and drills necessary to train civil defense forces and *inform the public*" (§23, subd. 19).

(3) Whatever situation may have existed in Washington, D. C. and Peoria, Ill. (the facts do not appear in the record of this case) has no application here. The instant violation was of a New York State statute, for failure to obey a New York City air raid warden's order made pursuant to local directives issued under state law.

(4) A. *The purported exemption to members of a religious order is not unreasonable and does not discriminate against this defendant.*

The appellants claim that the statute discriminates against them in that there is no reasonable basis for failure to include them in the exemption alleged to be granted in the New York State Defense Emergency Act to members of a "religious order" while engaged in "duties for" a "recognized church" or "religious organization" [§§100(1), 101(6)]. We never have and do not here contend that the appellants' churches or religious orders would not be entitled to be considered "recognized" under the definition of "exempt persons" (§100, subd. 1). Their claim, therefore (assuming that the definition as to exempt persons, here involved, was operative at all in favor of anybody, as to which see, *contra*, (4)B hereof, *infra*), depends, basically, on whether the appellants were engaged in "duties for" a church or religious organization within the meaning of that clause. In this regard, we never have and do not here contend for a limitation of "duties" to those that are popularly considered orthodox. It is clear, however, that whatever duties were within the legislative intendment must be religious ones and that the appellants, by using the occasion of the alert to publicize their opposition to civil defense, were engaging in

an activity basically political rather than religous. Beyond this, however, the appellants' claim of discrimination is that the definition (§100, subd. 1) unreasonably excluded them from engaging in a particular category of religious activity while exempting others in the same category. There is no basis for this claim, which is specious. They argue that what they were doing when sitting in the park was just as much a "religious practice or activity or in fulfillment of a duty" "as though they were attending a church service and singing hymns" (Statement as to Jurisdiction, p. 32). Obviously, however, the definition was not intended to exempt those attending a church service in a park during an air raid alert from obeying an official order to go to an available shelter, nor has the appellant shown that it was intended to do so. If the latter are not exempt, the appellants who claim equal treatment with them, cannot claim to be discriminated against. The very purpose of the statute was to enforce training that would make the taking of shelter, by civilians, second nature, so that it would be done automatically in an attack. It was intended that they learn to act and react *as if* it were the "real thing", just as the statute is applicable to the "real thing" also. Thus, it was clearly intended to apply to a category of religious activity altogether removed from that into which the appellants seek to fit themselves. Religious worship, to which the appellants assimilate their activity, involves the exercise of a "right", and, when sought to be exercised in a public park is necessarily subject to reasonable regulation as to time and place. The legislature, however, advisedly limited the potential exemption to "duties", thereby conveying, in the emergency setting of the statute, the not unreasonable concept of permitting an urgent religious ministration which could not wait;—which could not be postponed to a later time or another place. Indeed, the definition speaks of a "clergyman or member of a religious order" while engaged in duties "for" a church or religious organization.

In its setting, therefore, the exemption contemplated by the definition is intended for an *administrator* of religious rites, while engaged in emergency ministrations, imposed upon him as a duty to communicants by the tenets of his faith—and not themselves designed to subvert the law—such as extreme unction, baptism and confession, that cannot be postponed until the "all clear". Such a category of activities, reminiscent of ministrations daily performed under conditions of danger in disasters and even under battle stress, on behalf of a church, for communicants whose needs cannot wait, is one which, in this frame of reference, is seen to provide a classification that is not unreasonable for legislative or administrative exemption during civil defense activities. By the same token, as seen, it is in a wholly different category of activity from that in which the defendants were engaged.

(4) B. *Actually, it is crystal clear that the sections relied on do not ipso facto grant anybody an exemption while engaged in religious duties.*

In point of fact, although the arguments below assumed that the statute (§100, subd. 1; §101, subd. 6) *grants* to certain persons engaged in emergency religious duties exemption from taking shelter, a careful reading of the statute makes the following very clear: [1] Subdivision 1 of §100 merely sets forth a *definition* of "exempt persons". [2] Subdivisions 1-5 of §101 prescribe penalties for stated violations of Defense Council and Civil Defense regulations and orders, including failure to obey an order given on the scene by an authorized person. These involve both preparation against, and actual defense from, enemy attack. [3] Subdivision 6 of §101 makes it crystal clear, however, that *no person is exempted* from the provisions of §101, subdivisions 1-5, by virtue of the definition of "exempt person," *except* to the extent that a "regulation or order of the

council [State Defense Council] or commission [State Civil Defense Commission]" may so prescribe. This section (§101, subd. 6) reads as follows:

> "6. The provisions of this section shall not apply to exempt persons *to the extent prescribed by regulation or order of the council or commission.*"

The legislature, in thus entrusting to the State Defense Council and the State Civil Defense Commission the permissive discretion of whether, and the extent to which, it would activate the defined exemptions, wrote wisely indeed. The legislature in 1950 could not foresee to what extent clergymen or others engaged in religious duties could or should be exempted from the stated provisions (§101, subds. 1-5, *supra*), under the conditions of actual atomic attack or the requirements of particular drills, since those sections apply to both real and hypothetical raids. Indeed, had it given any such exemption as that for which the appellants contend, it would have meant that a clergyman *qua* clergyman, while engaged in his religious duties, would be automatically exempt, for instance, from obeying a *black-out* regulation or order, concerning "the effective screening or extinguishment of all lights, lighting devices and appliances" [§101, subd. 2(a)]. Yet that would be one example of the effect—with appalling potential consequences in the event of an attack—if the statute itself had made the definition operative. We know of no regulation or order of the State Defense Council, and have been advised by the State Civil Defense Commission that it has issued none under the permissive discretion granted them, by which either Body has authorized *any* exemption from the provisions of §101, subdivisions 1-5, for clergymen or members of a religious order. Nor did the appellants offer any in support of their defense. Thus, Deputy Chief Hearn spoke truly when, in response to questioning by the defense on the trial, he stated that, to his knowledge, there was no exemption for clergymen or members of a religious order.

(5) *Conferral of jurisdiction on the City Magistrates' Court clearly did not deprive the appellants of due process of law or the equal protection of the laws.*

The jurisdiction conferred by the Civil Defense Act upon the city magistrates' courts of the city of New York to try all misdemeanors (as well as lesser offenses) under the Act, was sustained herein by the New York Court of Appeals, which held that the legislature was authorized to confer it by Article 6, Section 18 of the New York State Constitution. By that section, courts of special sessions "and inferior local courts of similar character" shall have such jurisdiction of offenses of the grade of misdemeanor "as may be prescribed by law". The Court held that city magistrates' courts of the city of New York were "inferior local courts of similar character." The legislature, in promulgating the emergency civil defense act, decided, pursuant to that section, to give jurisdiction over charges of misdemeanors under the act to the same inferior local court upon which it was conferring jurisdiction to try lesser offenses under the act. Clearly, it was the view of the legislature that all cases charging violations of the civil defense act could best be handled by a single magistrate rather than by the three-justice court of special sessions. Indeed, prior to the instant statute, the city magistrates' court had the power for years, albeit with the defendant's consent, to try any of a long catalogue of misdemeanor cases; the single magistrate being regarded as sitting, for the purpose, as a judge of the court of special sessions (N. Y. C. Criminal Courts Act, §130, subds. "a" through "x"). This roundabout method of using the services of a single city magistrate was "undoubtedly considered necessary" [*People* v. *Aptaker* (Ct. of Sp. Sess., App. Part, 1st Dept. 1941) 25 N. Y. Supp. 2d 950, 952, not officially reported; to same effect *People* v. *Citarelli* (1st Dept. 1936) 247 App. Div. 53, 55] by the legislature because (as the opinion below attests) the state constitution had thereto-

fore been erroneously construed as not granting the legislature authority to vest misdemeanor jurisdiction, where it saw fit to do so, as here, in the city magistrates' court as such (see *Aptaker* and *Citarelli* cases).* The legislature, having decided, by virtue of its state constitutional authority, confirmed herein, to extend the jurisdiction of city magistrates *qua* city magistrates, over *all* the cases involving Civil Defense misdemeanors, by conferring it as part of the very enactment creating those misdemeanors, it is difficult to see how the defendants can claim discrimination. "* * * [T]hat a state may make different arrangements for trials under different circumstances of even the same class of offenses has been already settled by this Court" [*Brown* v. *New Jersey* (1899) 175 U. S. 173, 177; also, *Graham* v. *West Virginia* (1911) 224 U. S. 616, 630]. The defendants cite *Duncan* v. *Kahanamoku*, 327 U. S. 304, 330-1. The *Duncan* case, in which the prevailing opinion was written by Mr. Justice Black, held only that the phrase "martial law" in the Hawaiian Organic Act was not intended to exceed the boundaries between military and civilian power, and so was not intended to authorize "the supplanting of courts by *military* tribunals" (*ibid.*, 324; emphasis supplied). The New York legislature has fully respected the distinction between military and civilian power in the instant matter, by vouchsafing jurisdiction to the local branch of the civilian criminal court system which it deemed to be best qualified to handle this type of case. The construction of the state constitutional provision (N. Y. Const. Art. 6, §18) by the Court of Appeals is, of course, the law of the case, binding on this Court. Jurisdiction having been held to have been duly conferred pursuant to that provision by the state legislature, the city magistrate's court was a competent court to try the appellants herein, and any claim averring deprivation of due process or equal protection is, in the circumstances, specious.

*Since confirmation of legislative authority by the instant case, a 1960 law has vested exclusive jurisdiction in city magistrates to try all complaints of misdemeanors under the Gambling provisions of the Penal Law (N. Y. City Crim. Cts. Act §102-a, as amended by L. 1960, ch. 466, §3).

Conclusion

The appeal should be dismissed.

FRANK S. HOGAN
District Attorney
New York County

HAROLD ROLAND SHAPIRO
Assistant District Attorney
Of Counsel